

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

231971

FINANCE DOCKET NO. 35506

WESTERN COAL TRAFFIC LEAGUE –
PETITION FOR A DECLARATORY ORDER

ENTERED
Office of Proceedings


MAR - 6 2012

NOTICE OF INTENT TO PARTICIPATE OF
CONSUMERS UNITED FOR RAIL EQUITY

Part of
Public Record

Notice is hereby given that Consumers United for Rail Equity ("CURE") intends to participate in the hearing scheduled for March 22, 2012. We request 10 minutes for CURE's presentation. Mr. McBride will appear on behalf of CURE.

Respectfully submitted,



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March 6, 2012

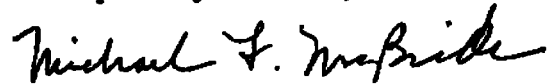
UNITED STATES OF AMERICA
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SUMMARY OF ARGUMENT FOR
CONSUMERS UNITED FOR RAIL EQUITY

Respectfully submitted,



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SUMMARY: ARGUMENT OF CONSUMERS UNITED FOR RAIL EQUITY

I. THE BOARD HAS THE AUTHORITY AND DUTY TO DETERMINE IF THE BERKSHIRE HATHAWAY-PAID PREMIUM SHOULD BE INCLUDED IN BNSF'S URCS COSTS OR IN ITS INVESTMENT BASE.

AAR argues that the Board is required by GAAP accounting rules to include the acquisition premium paid by Berkshire Hathaway in the URCS costs and investment base of BNSF. No. The Rail Transportation Policy (49 U.S.C. § 10101) governs the Board's regulation of the railroads and requires the Board to regulate in a manner that it is fair, accurate, and reasonable. It would be unfair, inaccurate, and unreasonable to allow BNSF to include in its URCS costs or investment base an expense that it did not incur. CURE believes this matter is a case of first impression and is not governed by any previous ruling of the Board.

II. THERE IS NO CONTROLLING PRECEDENT.

This proceeding is not one to decide whether to permit one railroad to merge with or acquire another, as was the situation in the "precedent" BNSF cites. There is no precedent for allowing, in the face of opposition, a merger or acquisition premium paid by a financial investment company to be treated as if the premium were a cost incurred by the railroad itself. URCS costs are the actual costs of the railroad in question, and BNSF did not incur the premium. That should be the end of the matter.

BNSF contends (Reply Arg. at 5) that the shippers' "attempts to distinguish [STB] precedent as applied to the Berkshire acquisition are unavailing." But the cited precedents in which the treatment of the premium was at issue were instances in which the ICC or the Board permitted a merging or acquiring railroad to include in its costs the

premium it paid in the URCS costs and investment base of the resulting single railroad.

Neither the ICC nor the Board has ever permitted the premium paid by a financial concern for a railroad to be included in the URCS costs or investment base of the acquired railroad over the objection of affected shippers. There is no public policy merit in treating a premium paid by a non-railroad acquirer as a cost of the acquired railroad.

III. THE BOARD SHOULD NOT PERMIT THE PREMIUM PAID BY BERKSHIRE HATHAWAY TO AFFECT THE URCS COSTS AND INVESTMENT BASE OF BNSF: BNSF DID NOT PAY THE PREMIUM; THE WRITE UP OF COSTS WILL NOT INCREASE THE ABILITY OF BNSF TO ACCESS CAPITAL; AND THE WRITE UP OF COSTS WILL HURT SOME RAIL DEPENDENT SHIPPERS

There is no dispute that rates on competitive rail traffic are set by the marketplace, not by regulation, so any effect of the Berkshire Hathaway-paid premium on regulatory policies is irrelevant to competitive traffic. Is the purpose of BNSF's efforts so that BNSF will be better able to attract capital? No, because BNSF itself no longer raises capital. BNSF stock is wholly owned by Berkshire Hathaway. BNSF raises capital through Berkshire Hathaway, such that lenders and investors would look at the entire balance sheet of Berkshire Hathaway, not just that of BNSF, to determine whether to lend or invest. The only apparent effect of BNSF's proposal to increase its URCS costs and write-up its investment base due to the Berkshire Hathaway-paid premium are (1) to increase the effective threshold (stated as a percentage of BNSF's variable costs) for Board jurisdiction over "captive" BNS rates, so as to effectively deregulate some traffic now subject to the Board's jurisdiction, and (2) to allow BNSF to increase those rates over which the Board would still have jurisdiction because of the impact of the premium on BNSF's URCS costs and investment base.

If BNSF denies that those are its purposes, all it would have had to do is urge the Board not to increase its URCS costs and investment base due to the payment of the premium by Berkshire Hathaway, when it made its R-1 filing in March 2011. But BNSF did not do that, and instead opposed WCTL's Petition herein, and is fighting hard to increase its URCS costs and investment base because of the premium. These are the actions, then, of a monopolist to deny some of its captive traffic access to the Board for rate complaints, not those of a company concerned about remaining competitive.

BNSF witnesses Kolbe and Neels candidly acknowledged (V.S. at 20) what the RAPB Report, at pages 41-42 of Chapter 7, acknowledged: that asset values should be based on historic costs when the agency uses the nominal cost of capital to determine revenue adequacy (as the Board does), so as to avoid a "double count" of inflation.

The reason that the Berkshire Hathaway-paid acquisition premium should not be included in BNSF's URCS costs and should not affect BNSF's investment base for use in the Board's revenue adequacy calculations for BNSF is simply this: BNSF did not pay the premium. The Board should not treat BNSF as having incurred a cost it did not incur, or as being less revenue-adequate based on a premium paid by a different entity. That premium does not represent either costs incurred or investments made by BNSF.

If the Board prevents BNSF's URCS costs and investment base from reflecting any portion of the Berkshire Hathaway-paid acquisition premium, BNSF would not be adversely affected, because BNSF is the same railroad, with the same costs, and the same management, as it was before it was acquired by Berkshire Hathaway. There is, therefore, no reason to treat BNSF, for regulatory purposes, any differently than before the premium was paid. The Board should reject the requests of the BNSF.